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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724.

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, United States Penitentiary, McNeil Island, Washington, *Respondent.*

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF,— PETITION DENIED MARCH 27, 1944.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CLYDE H. WALKER, *Petitioner,*

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(This is a Petition for Rehearing in Habeas Corpus, the Points Being First Summarized, Followed by a Statement of Facts and the Argument.)

Petitioner asks a rehearing herein because the decisions below, if condoned, will be of great and constantly recurring, nationwide, irremedial harm to the Government and to innocent persons accused of crime, who do not have the means to compete in hiring experts. They are in conflict with this Court's decisions and with State and Federal decisions generally, and the text books. The three most vital issues involved were not presented and two were inadequately presented owing to insufficient time to study the case. The grounds relied on are as follows:

1. **(New.)** The Prosecution concealed the fact **(through testimony known to them to be perjured)** that the witnesses as to value, **(guilt depending on that alone)**, were experts, which was "the failure to observe that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *Calif.*, 314 U. S. 219), and entitles petitioner to a reversal of the conviction.

Accused offered to show that he did not know until after the time for appeal had expired, that these witnesses were experts, but the Judge summarily, erroneously overruled this contention,—

> "That * * * allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence" (*Walker* v. *Johnson*, 312 U. S. 275, 287).

As the Government destroyed the minutes, there is a conclusive presumption that they would prove petitioner's contention (*Taylor* v. *Riggs*, 1 Peters 591, 690, opinion by Chief Justice Marshall; 2 Wigmore (3rd Ed.) § 277, pp. 119, 120), secondary evidence not being admissible as the minutes could not be satisfactorily reproduced, (*Renner* v. *Bk. of Columbia*, 9 Wheaton 581, 597; *Taylor* v. *Riggs, supra*).

The prosecution planned this concealment: Tarr, who was paid $25.00 a day for 8 days in Court, testified (Tr. 6) that he was paid $25.00 per day **while at the property** (Tr. 8), whereas he was not there before this, but only during the former trial and was paid for testifying and only for testifying at this trial (Tr. 6), thus successfully concealing that he was testifying as an expert.

It was the duty of the prosecuting officer not to allow this perjured testimony to stand, and his doing so was—

> "* * * a deliberate deception of Court and jury by the presentation of testimony known to be perjured. * * * as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation" (*Mooney* v. *Holohan*, 294 U. S. 103, 112; See also *Lisenba* v. *Calif.*, 314 U. S. 219, 237 and *Martin* v. *U. S.*, 17 F. (2d) 973).

Moreover,—

> "* * * it is the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendant * * *." (*Commonwealth* v. *Sacco*, 255 Mass. 369; 23 C. J. S. § 1081, p. 519);

and certainly Tarr, by this perjured answer, proved that he was strongly biased and he should have been withdrawn as a witness.

Concealing the expert character of these witnesses was extremely material and the prosecution "* * * contrived a conviction through * * * a deliberate deception of court and jury * * *" (*Mooney* v. *Holohan, supra*). Because of this deception and perjured testimony **the conviction should be set aside,** for, if it had been known, defendant would have had the right in his argument to advise the jury that they were,—

> "* * * not bound by the opinion of an expert witness" (2 Wharton Crim. Ev., 11th Ed., § 1025, p. 1792), and
>
> "* * * expert testimony should be submitted to the jury by the Court under the proper cautionary instructions, * * *" (Id., p. 1793) and,
>
> "* * * and the action of prosecuting officers in behalf of the State, * * *, may constitute State action within the purview of the Fourteenth Amendment" (*Mooney* v. *Holohan, supra*).

2. **(New) The District Court violated the Statute by refusing to receive evidence of the concealment of the character of the witnesses as experts,—a vital issue, as has been shown.**

The Court summarily refused to receive this evidence as unbelievable, in conflict with *Walker* v. *Johnson, supra,* holding,—

> "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him the opportunity to support them by evidence."

The denial of the right to receive this evidence was far greater error than that committed in *Walker* v. *Johnson, supra;* there, the Court erred by basing its decision on affidavits instead of taking testimony, while here, **any** hearing on this very vital matter was denied. **The Statute entitled petitioner to a hearing and the Judge had no right to determine this vital question summarily and without a hearing** (*Waley* v. *Johnston*, 316 U. S. 101.)

3. **Expert witnesses were paid large sums, violating § 601, Title 28, U. S. C. A., the 1939 Dept. of Justice Apprtn. Act, passed April 27, 1938, and the bribery statute, § 240, Title 18, Crim. Code, by which Congress provided an effective method to prevent bringing unjustifiable prosecutions based on purchased expert testimony, thus protecting the taxpayer and accused persons, which fails if the decisions below stand. Instead, the 184 prosecuting officers will employ experts when and at what prices, they please.**

The language of these three Statutes is plain, with no room for construction. The law is double-locked: § 601 fixes the fees and the Appropriation Act prohibits paying more, and these two Acts fit into the bribery statute as a complete plan of double protection to the taxpayer and the accused.

The Circuit Court of Appeals held that violating the three Statutes was not denial of a fair trial or due process, but this Court holds that violation of statutory procedure is reversible error (*Walker* v. *Johnson*, 312 U. S. 275; *McNabb* v. *U. S.*, 318 U. S. 332; *Chambers* v. *Florida*, 309 U. S. 227); and *Henkel* v. *C. M. St. P. & P. Ry. Co.*, 284 U. S. 444, holds that the federal statutes prohibit, in all cases, payment of expert fees.

4. **The "Official Court Reporter," pending the hearing in the Circuit Court of Appeals, destroyed the minutes. The Government is responsible for this fraudulent act, and it gives rise to a conclusive presumption that petitioner should have been acquitted.**

(a) The Government is responsible for the spoliation: the destruction was by the "Official Court Reporter," appointed as such by the District Judge, whose letterhead proclaimed him such official, who was given an office in the courthouse and must have been paid by the Government, since petitioner defended as a pauper; he had the right to exercise a public employment and to take the emoluments, which is holding an office (2 Blackstone Com. 36); **the Government** permitted him to assert that he was, and **held him out as, an official** and cannot assert the contrary (*Whiteside* v. *U. S.*, 93 U. S. 247; 31 C. J. S. 108, p. 341); the Government entrusted him with the custody of the minutes and it must stand the consequences (19 Am. Jur. p. 335, § 483 and p. 695, § 67); and it is responsible for his lack of judgment or discretion (35 Id. 975, § 544).

(b) As the destruction was pending hearing the appeal, the inference is that it was fraudulent (11 Cyc. of Ev. 956).

(c) Secondary evidence of the minutes cannot be received both because they were destroyed by design, and no satisfactory proof of their contents can be made. (*Renner* v. *Bk. of Columbia, supra; Taylor* v. *Riggs, supra.*)

The rule is that all presumptions are drawn against poliators. Here, the issues were whether petitioner was lenied due process and whether he was guilty, and preumptions arise that he was denied due process and was nnocent, and, as secondary proof to the contrary cannot e made, this presumption is conclusive (*Taylor* v. *Riggs, upra;* 2, *Wigmore on Ev.* (3rd Ed.), § 277, pp. 119, 120).

Facts Alleged in the Petition.

The Statutes involved are:

1. Section 601, Title 28, U. S. C. A. which was in force until December 24, 1942 and when the trial took place between October 1938 and February 1939, and provided that, "witnesses shall be paid for each day's attendance in court * * * $1.50 * * *."

2. The Department of Justice Appropriation Act of 1939, passed April 27, 1938, providing, " * * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50."

The essential part of the definition of bribery in the Federal Statutes is as follows:

> "Whoever, being, or about to be, a witness upon a trial * * * before any court * * *, shall receive, * * * a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, * * * or because of such testimony, * * * shall be fined not more than $2,000, or imprisoned not more than two years, or both." (U. S. C. A. Title 18, § 240, Criminal Code.)

Petitioner alleges—

1. That witnesses were paid for testifying,—Raymond P. Tarr, $200 for 8 days (Tr. 6), but testified that he was paid $25.00 per day **while at the property** (Tr. 7); Thos. F. Downing, Jr., $250 for 10 days; and Geo. E. Evans $50.00 for 2 days (Tr. 6).

2. That Tarr had tried to get employment with the United Collieries Company after the indictment and prior to the trial herein, and not succeeding and for a consideration, he testified falsely (Tr. 8-9).

3. That the purpose of paying these witnesses was to influence them to falsely testify that coal does not exist in commercial quantities in the property of

United Collieries Company at Glacier, Washington (Tr. 9).

4. That petitioner did not learn of the illegal payments to Downing, Tarr and Evans until August 20, 1942,—long after the time to appeal had expired (Tr. 6, 7, 9-10).

5. That petitioner reasserts his denial of guilt (Tr. 13).

6. Respondent's answer admitted that various persons, including Raymond Tarr, were paid as expert witnesses, and made a general denial of other allegations.

The Court ruled,—

That the government has no power to compel an expert to express an opinion; that such payment did not mean that corruption and bribery exists; that payment did not violate the law or a constitutional right (Tr. 42-46); but it would not bar evidence that the witnesses were bribed and thus swore falsely (Tr. 53); but that bribery, unless petitioner had direct evidence, should have been and he believed was covered when the witnesses testified; and he ruled against petitioner (Tr. 57).

Petitioner stated that he did not know the witnesses were experts, that they were not so qualified, and that nothing was said in this respect except that Tarr falsely testified that he was getting $25.00 a day **while at the property.** The court ruled that petitioner must have known (Tr. 43-46).

Petitioner stated that he learned eight weeks before the hearing that Downing made a report in 1917 the opposite of his trial testimony; the court ruled that expert witnesses were free to change their minds and it would not indulge in any presumption that the $250.00 paid Downing changed his mind, but would not foreclose any admission by Downing (Tr. 54-55).

Petitioner asked whether the court would consider evidence that Tarr, in 1937, asked the United Collieries for a job and told them that the property involved here was valuable. The court asked whether petitioner cross-examined Tarr and petitioner replied that he did not know the facts until after his conviction; the court reiterated that only direct evidence of bribery would be received (Tr. 57). **The court directed that a transcript be furnished because he was unable to find a case challenging the payment of expert fees** (Tr. 60).

Petitioner filed objections and suggestions to the proposed findings of fact and conclusions of law. The court found that the payment of $25.00 a day to experts did not constitute bribery or affect jurisdiction (Tr. 31).

ARGUMENT.

I.

The Prosecution concealed the fact (through testimony known to them to be perjured), that the witnesses as to value (guilt depending on that alone), were experts, which was "the failure to observe that fundamental fairness essential to the very concept of Justice" (Lisenba v. Calif., 314 U. S. 219), and entitles petitioner to a reversal of the conviction.

(a) NEW. The facts show conclusively that the **prosecution deliberately planned to conceal the character of the value witnesses as experts, and succeeded in this plot.** The proof is as follows:

1. These witnesses had visited the mine and so could testify to facts from observation, and so could mislead and did deceive petitioner into the belief that they were not testifying as experts.

2. Tarr swore that he was being paid as an expert **for the time spent at the mine**, which was false and perjured in that he had not been at the mine previous

to this, the second trial, but only during the first trial, and he was paid on this trial for 8 days **attendance to testify, and only for that.**

3. The prosecuting attorney was present at the hearing and vigorously opposed the granting of the writ and when petitioner claimed that he did not know that the value witnesses were experts until after the time to appeal had expired, he could have easily disproved this claim (if it had been contrary to the fact), by asserting that the petitioner in his final address told the jury that they were not obliged to receive the opinion of the experts, and that the trial judge, as it was his duty to do and as beyond question he would have done if the value witnesses had appeared to be experts, charged the jury that the opinions of the experts must be received with caution. Failure of the prosecuting attorney to state this is conclusive proof that petitioner did not make this statement to the jury and that the Judge did not so instruct them, and that petitioner was thus deprived of these two highly valuable items of his defense.

That the facts were not proved in more detail was due to the erroneous ruling of the trial Judge in summarily refusing to receive proof because he thought it "improbable and unbelievable." (*Walker* v. *Johnson*, 312 U.S. 275, 287.)

(b) **The successful working out by the prosecution of this scheme to conceal the expert character of the witnesses, involved the omission by the prosecuting attorney of a plain duty**: he knew that Tarr's answer was perjured and **he should have promptly disclosed this to the Court and the jury,—**

> "* * * a deliberate deception of Court and jury by the presentation of testimony known to be perjured," is "* * * as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by

intimidation." (*Mooney* v. *Holohan*, 294 U. S. 103, 112; See also *Lisenba* v. *Calif.*, 314 U. S. 219, 237 and *Martin* v. *U. S.*, 17 F. (2d) 973.)

"He" (a District Attorney), "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger* v. *U. S.*, 295 U. S. 86, 88, 79 L. Ed. 1321.)

Moreover,—

"* * * it is the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants * * *." (*Commonwealth* v. *Sacco*, 255 Mass. 369; 23 C. J. S. § 1081, p. 519.)

and certainly **Tarr, by this perjured answer, proved that he was strongly biased** and he should have been withdrawn as a witness. Concealing the expert character of these witnesses was extremely material and the prosecution "* * * **contrived a conviction through * * * a deliberate deception of court and jury * * *"** (*Mooney* v. *Holohan, supra*), **which should be set aside**, for, if it had been known, defendant would have had the right in his argument to advise the jury that they were,—

"* * * not bound by the opinion of an expert witness" (2 Wharton Crim. Ev., 11th Ed., § 1025, p. 1792), and

"* * * expert testimony should be submitted to the jury by the Court under the proper cautionary instructions, * * *." (Id., p. 1793.)

"* * * the evidence of experts is of the very lowest order and of the most unsatisfactory character." (Jones on Evidence, § 1371, p. 2510.)

"* * * and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony

of expert witnesses employed by the parties." Knoxville v. Knoxville Water Co., 212 U. S. 1 at 18.

"Skilled witnesses come with such prejudice on their minds that hardly any weight should be given to their evidence. Appleton Waterworks Co. v. R. R. Commission, 154 Wis. 121 at 154, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160."

The last two quotations are taken from Note 13, Page 429 of *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419.

The rule as to the unreliability, the inherent weakness of expert testimony is peculiarly applicable here because,

1. The question was the productive value of a mine and, in a similar case, this Court stated,—

   "In the first place, the intrinsic value of the leases is dependent upon the capacity of the lands to yield productive wells, a capacity seldom to be judged with even a fair approach to certainty until tested by experience." (*Dayton P. & L. Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299.)

2. The bias of the witness Tarr was shown by his perjured answer to the question as to whether he was an expert witness, as to which this Court said in the same case at page 299,

   "To these perturbing tendencies, all operating to weaken the persuasive force of their (expert) opinions, there must be added still another, that of interest or bias, conscious or unconscious,"—here not alone conscious but expressed through perjured testimony.

(c) As the Government destroyed the minutes and they could not be satisfactorily reproduced, and secondary evidence is not therefore admissible (*Renner* v. *Bk. of Columbia, supra; Taylor* v. *Riggs, supra*), there is a conclusive presumption that they would prove both that petitioner did not have a fair and impartial trial and was **denied due process**, and that he should have been acquitted.

We quote from an opinion by Chief Justice Marshall,—

> "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement." (Taylor v. Riggs, 1 Peters 591, 600.)

See also *Renner* v. *Bk. of Columbia*, 9 Wheaton 581, 597.

(d) The conviction also should be reversed because it was obtained by the perjured testimony of Tarr,—

> "It" (**due process**) "is a requirement that cannot be deemed to be satisfied by mere notice and hearing, if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (*Mooney* v. *Holohan*, 294 U. S. 103, 112.)
>
> "* * * in Martin v. United States, 17 F. (2d) 973, * * * the court said: 'There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury,' * * *."

(e) The way the **witnesses** earned the payment of these illegal fees is illustrated by the perjured testimony of Tarr. The payment to these witnesses of expert fees was,—

> "* * * the giving * * * to another anything of value, * * * intended to influence him in the discharge of some legal duty." (*Dishon* v. *Smith*, 10 Iowa 212);

the public duty of testifying on payment of the ordinary statutory fee. (See also *People* v. *Peters*, 265 Ill. 122.)

Bribery has been found, where it depended on influencing testimony and was expressly denied,—where the proof was much less clear than it is here. We quote 2 cases,—

In *Wilson* v. *U. S.*, 77 F. (2d) 236 (Cert. denied 295 U. S. 759), defendants, who had been prohibition officers and had participated in raids on illicit manufacturers of liquor, offered to have proceedings against violators against whom they had evidence, quashed for a cash consideration, which was paid defendants by the violators. Defendants were indicted for accepting money upon an agreement that their testimony would be influenced thereby in violation of said § 240. The court held—

> "So far as the evidence shows, the defendants had nothing to sell except the suppression of Wilson's evidence, and, although the purchasers testified that no agreement to the effect that Wilson's testimony against them was to be influenced by their payments, was actually expressed, we think that the jury were justified in inferring that bribes were accepted for that reason and upon that understanding, since the testimony is inconsistent with any other reasonable hypothesis."

Again, in *State* v. *Ventola*, 122 Conn. 635, 110 A. L. R. 578, it was held,

> "In the exercise of reason, the trial court could hardly have concluded otherwise than that the offer of payment of $200. to Riolino, a relief worker, for testimony before a referee, and $100. additional for testimony in court, was intended to influence the testimony. There is no basis in the record for an inference that such offer could have been made to cover any legitimate or reasonable expense of the prospective witness in attending the trial or for any proper or legitimate purpose.

> The conclusion is inescapable that the offer was made to influence Riolino to testify less favorably to Pouzzner than he otherwise would have done."

II.

NEW. The District Court violated the statute by refusing to receive evidence of the concealment of the character of the witnesses as experts,—a vital issue, as has been shown.

The Court summarily refused to receive this evidence as unbelievable, in conflict with *Walker* v. *Johnson, supra,* holding,—

> "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him the oportunity to support them by evidence."

The denial of the right to receive this evidence was far greater error than that committed in *Walker* v. *Johnson, supra:* there, the Court erred by basing its decision on affidavits instead of taking testimony, while here, any hearing on this very vital matter was denied. The Statute entitled petitioner to a hearing and the Judge had no right to determine this vital question summarily and without a hearing.

III.

Expert witnesses were paid large sums, violating § 601, the 1939 Dept. of Justice Appropriation Act and the bribery statute, § 240, providing an effective method to prevent unjustifiable prosecutions based on purchased expert testimony, thus protecting the taxpayer and accused person, which fails if the decision below stands, in which case the 187 prosecuting officers will employ experts when and at what prices they please.

The original brief, after quoting § 601 and the Appropriation Act, urged that,—

(a) An expert may be compelled to testify for the fee of an ordinary witness, citing authorities;

(b) That violation of the 2 Statutes was a violation of procedure, depriving petitioner of his constitutional rights, and requiring reversal of the conviction, citing *Walker* v. *Johnson, supra; Miller* v. *U. S.*, 120 F. (2d) 968, 969, 973; *Weiss* v. *U. S.*, 308 U. S. 321.

(c) That the courts below mistakenly held that the contention that excess payments were bribery depended on an inference only, whereas payments were made to influence the witnesses in the discharge of their legal duty to testify, which is bribery, it having a tendency to pervert justice, citing *Peo.* v. *Peters, supra; Harrison* v. *State*, S. W. 552; *Dishon* v. *Smith, supra; Peo* v. *VanDeCarr*, 84 N. Y. S. 461; *Commonwealth* v. *Bell*, 145 Pa. 374.

(d) That petitioner did not know that the witnesses were experts; they were not qualified as such, and nothing was said in court to that effect; Tarr was asked what he was and answered that he was getting $25 a day **while at the property**, whereas he was paid $25 for 8 days court attendance (Tr. 6), although he testified only 2 days (Tr. 7-45). Moreover, he went to the mine but once and that during the first trial, and he was paid for 5 days there and **only for testifying at this, the second trial.** So, his answer was contrary to the fact and clearly intended to be so, both in the circumstance that he was not paid at the second trial for being at the property, and that he was paid for testifying and only for testifying. Downing testified for one day and was paid for 10 days as an expert witness,—$250 (Tr. 6); Evans testified one day and was paid for 2 days (Tr. 6-27).

It is now urged that,—

(a) § 601 and the Appropriation Act are both clear and need no construction, and that *Henkel* v. *C. M. St. P. & P. Ry. Co.*, 284 U. S. 444, lays down a broad and general rule that the federal statutes do not permit payment of more

than the ordinary fee to experts and the decision is **not limited** to taxation of a bill of costs. We quote from the opinion by Chief Justice Hughes:—

> "But this provision, by its terms, is inapplicable, as the Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the Federal courts of any different State practice."

(b) **The use of evidence improperly obtained, as it was used here, is a denial of due process, requiring a reversal. We quote from** *McNabb* v. *U. S.*, 318 U. S. 332.

In the McNabb case, quoted below, the grounds of reversal were that it was questionable whether confessions were voluntary and that the arresting officers failed to take the accused promptly before a committing magistrate, as the State requires.

The Court condemns the violation of the Statute in the eloquent and forceful language as follows:

> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."
>
> "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of procedures imposed by law." (pp. 346, 347.)

See also *Chambers* v. *Florida*, 309 U. S. 227.

(c) Payment of the excess amounts was unnecessary because expert witnesses can be compelled to testify for the fees of ordinary witnesses, as is held by the following authorities in addition to those heretofore cited, viz,—8 Wigmore on Evidence §2203, p. 134; 2 Wharton's Crim. Evidence, 11th Ed., § 1025, pp. 1793, 1794.

IV.

The "Official Court Reporter," pending the hearing in the Circuit Court of Appeals, destroyed the minutes. The Government is responsible for this fraudulent act, and it gives rise to a conclusive presumption that petitioner should have been acquitted.

The various grounds on which the Government should be held responsible for the destruction of the minutes by the "Official Court Reporter" are stated in the Summary under Point 5 and need not be repeated here. Briefly stated, the Government appointed this man, acquiesced in his holding himself out as an official, gave him a courthouse office, and entrusted the papers to him as its official. The Judge and prosecuting attorney knew that the minutes should be preserved until petitioner had served out his sentence, **to enable him to prove on habeas corpus that he had not had a fair or impartial trial, but had been denied due process,** yet **they** left the minutes in the hands of this "Official Court Reporter" and thus afforded him the opportunity to do it, and he destroyed them at the opportune time for the Government, when the appeal to the Circuit Court of Appeals was pending.

Under such circumstances, the petitioner should not be forced to suffer from this wrongful spoliation.

Because of its holding this man out in these various ways as an "Official Court Reporter" (and much more, taking all the circumstances into consideration), **the Government is liable for this spoliation.**

> "* * * but the government or public authority is not bound in such a case" (where the act was done by the agent in the course of his regular employment), "unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government." (*Martin* v. *Hazard Powder Co.*, 93 U. S. 247, 258.)

"* * * the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim." (*U. S.* v. *Denver etc. Co.*, 16 F. (2d) 374, 376.)

CONCLUSION.

The prosecution "contrived a conviction through,—

1. a deliberate deception of court and jury" (*Mooney* v. *Holohan, supra*), by concealing the fact that the only material witnesses were experts "upon the capacity of the lands," (here, a mine), "to yield productive wells," (here, commercial quantities of coal), "a capacity seldom to be judged with even a fair approach of certainty until tested by experience," (*Dayton* * *Co.* v. *Pub.* * * *Com., supra*), and petitioner, through this concealment was denied the invaluable right to have the Court charge the weakness of this testimony;

2. "the presentation of testimony known to be perjured," (*Mooney* v. *Holohan, supra*), that of Tarr; and

3. the failure of the prosecuting attorney to perform his duty by advising the court and the jury that this testimony was perjured, (*Berger* v. *U. S., supra*), and to select unprejudiced experts (*Commonwealth* v. *Sacco, supra*), and to withdraw Tarr as a perjured and biased witness from the stand, (*Berger* v. *U. S., supra*).

"Such a contrivance * * to procure the conviction * * of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result from intimidation," (*Mooney* v. *Holohan, supra*).

Besides this contrivance, **expert witnesses were paid 16 times the fees permitted by the three statutes, violating them and nullifying the comprehensive plan of Congress to protect the Treasury and the taxpayer and the poor man defending, as here, as a pauper, from conviction through purchased testimony,**—not alone violating statutory pro-

cedure and requiring reversal, (*Walker* v. *Johnson, supra; Miller* v. *U. S., supra; Weiss* v. *U. S., supra; Henkel* v. *C. M. St. P. & P. Ry. Co., supra; Dishon* v. *Smith, supra*), but unnecessarily, since these experts could have been compelled to testify for the ordinary fees, (*8 Wigmore on Ev.*, § 2203, p. 134; *2 Wharton Crim. Ev.* (11th Ed.), § 1025, p. 1793).

And the Government endeavored to make this conviction by contrivance and through bribery and perjured testimony stand, through fraudulent destruction of the minutes, at just the time when it was expected they would be needed, and, as they cannot be satisfactorily reproduced, "the party" (spoliator), "is in the condition of every other suitor in court who makes a claim which he cannot support," (*Taylor* v. *Riggs, supra*),—here the contention is that the conviction should stand, whereas it should be set aside, and **habeas corpus** is the **only means** to preserve petitioner's constitutional rights (*Waley* v. *Johnston*, 316 U. S., 101, 104, 105).

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Ninth Circuit be, upon further consideration, reversed.

Respectfully submitted,

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I, **S. Wallace Dempsey**, counsel for the above-named CLYDE H. WALKER, petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

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Counsel for Petitioner.